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# Negotiating Surface Rights



Alberta

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# Introduction

This pamphlet provides basic information for landowners and occupants who are involved in negotiations related to surface rights. Negotiating a surface rights agreement can involve many aspects that are specific to your own situation. This pamphlet gives an overview of a complex topic. If you have questions about surface rights agreements, please call the Farmers' Advocate office at 310-FARM (3276).

## Well Site Leases

### Your Rights and the Company's Rights

Most land in Alberta has two titles. The owner of the surface title has control of the land's surface and the right to work it. The owner of the mineral title has the right to explore for and produce oil, gas and other minerals from under that land surface. The surface owner's Certificate of Title is subject to the mineral owner's right to enter the land in order to work and remove the minerals. This approach to land rights is based on the assumption that obtaining oil, gas and other minerals is in the general public's interest and only when the Crown is the mineral owner.

Several important responsibilities apply to an oil and gas company's right to develop a well site on your land:

- The company must offer information to you about the development (e.g. the reason for selecting a particular location for the well site, the types of equipment to be used at the site).
- The company must follow regulations for environmentally and technically acceptable drilling and production.
- The company must operate in ways that cause the least possible interference with your use of the land.

For private lands that are rented, the details of the agreement between the landowner and renter should determine the specific role of the renter in the negotiation process.

### Steps in the Lease Process

#### Seismic Survey

A seismic survey provides geological information so the company can determine an area's potential for mineral development. The company **must** obtain the approval of and negotiate an agreement with the landowner/renter to enter private land for a seismic survey. For Crown land, the occupant cannot deny reasonable access to the company. The exception to this is road allowances.

For more information, refer to the publication *Seismic Operations, Learning the Industry*, available from the Farmers' Advocate office at 310-FARM (3276) or [www.farmersadvocate.gov.ab.ca](http://www.farmersadvocate.gov.ab.ca)

#### Land Survey

If the geologic information looks promising for oil and gas development, the company will need to survey the land to select the location for the well site and access road. The company must make a reasonable attempt to notify you of its intent to do the land survey. You cannot deny access for land survey work related to energy activity. The company must pay for any damage done during the survey.

It is a good practice to ensure that specifics to the surveying/surveyors are in writing so both you and the crew understand your expectations. This is when you map out your negotiation position.

#### Initiating Negotiations

If the company wants a well site on your land, either a company or independent land agent will approach you with a proposed surface lease agreement for the well site and access road. A survey plan showing the area the company wishes to lease forms part of the agreement and must be attached to the offer. The agreement must also describe the compensation the company is prepared to pay to you.

Under the *Land Agents Licensing Act*, the proposed agreement must be left in your possession for at least 48 hours (not including Sundays or legal holidays) before negotiations can begin. You are not required to sign the lease immediately at the end of 48 hours. The waiting period is for your protection, so you can carefully study the details of this important document and prepare for negotiations. During the 48 hours, the land agent cannot begin negotiations unless you choose to waive the waiting period.

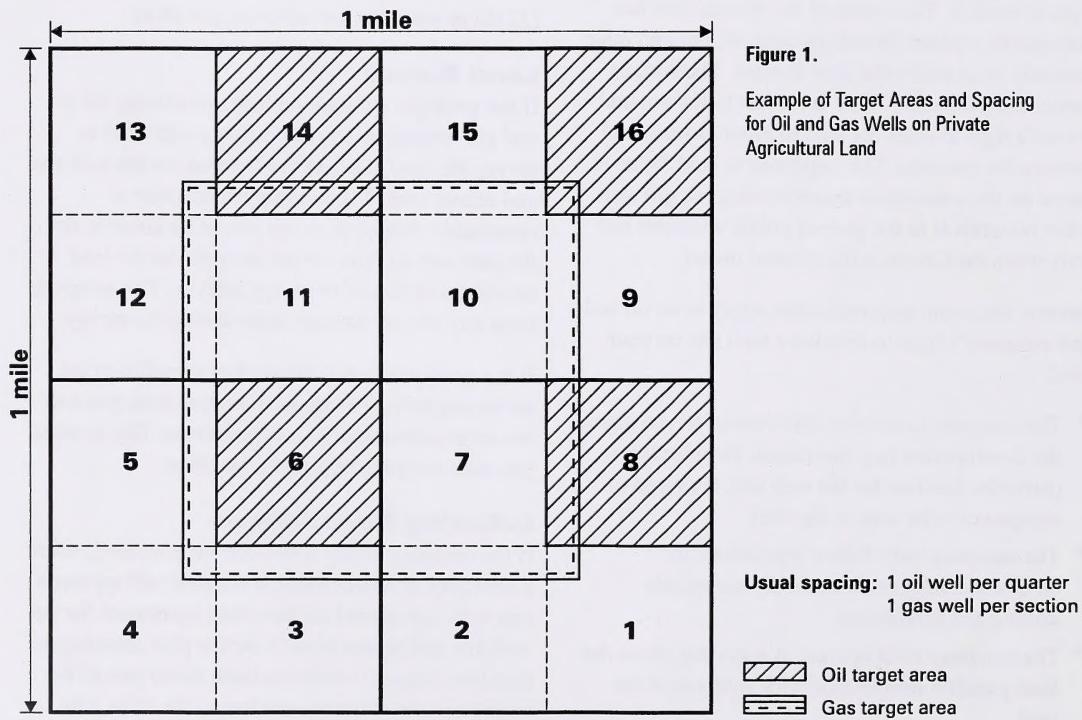
### Location Negotiation

The next step in the process is to negotiate the exact location of the well site and access road. Review the company's survey plan to ensure that you understand the area under consideration. If the proposed location would have an unusually adverse effect on your land or land use, then you will need to try to negotiate a reasonable alternative with the company.

Usually the landowner and the company can reach an agreement on the location. Then the company can apply to the Energy Resources Conservation Board (ERCB) for a well site licence.

If you and the company cannot agree on the location, then you will need to inform the ERCB of your outstanding concerns. The ERCB will not issue a well site licence without the landowner's approval of the location. The dispute may be settled either through ERCB mediation or hearing. There is no set time for this process. If a hearing is necessary, the ERCB will consider your objections related to the well site location and access road.

Well locations are based on the company's geological interpretation and on the ERCB's well spacing and target area requirements. Figure 1 shows an example of these requirements, but the actual spacing and target areas will be set out in specific spacing orders.



## **Well Spacing Changes**

Bulletin 2006-24 of the ERCB outlined new well spacing for both gas pooling and oil pooling. The baseline densities have been increased.

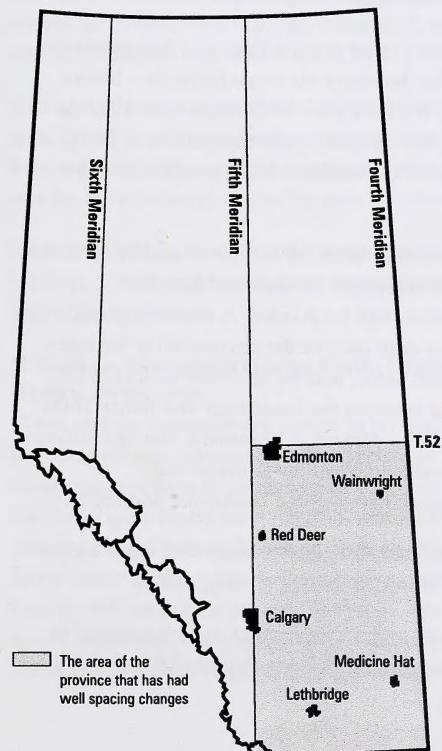
### **Gas**

Two wells per section in the Mannville Formation and four wells per section above the Mannville. Below the Mannville, one well per section is maintained.

### **Oil**

Two wells per pool per quarter section in the Mannville Formation. For all other formations, the well density remains as one well per quarter section.

New target areas for drilling spacing have also been revised for SE Alberta. Figure 2 shows the area of the province affected by the spacing changes according to the *Oil and Gas Conservation Act Amendment Regulation*.



**Figure 2.**

If you have questions about well spacing and target areas, contact your nearest ERCB office (see list on page 6).

## **Surface Lease Negotiations**

A surface lease legally secures the company's interest in a specific piece of land for the purpose of extracting minerals. The company is not allowed on your property, except to conduct the land survey, until the lease has been negotiated, signed, and the first-year compensation paid. If the land is rented, the company must obtain the consent of both the landowner and renter.

### **Working Out the Details**

The lease sets out the terms and conditions that will govern all future transactions between you and the company. Therefore, it is essential that the lease be as comprehensive as possible and tailored to deal with your specific circumstances.

The company usually prepares the proposed agreement. Then you and the company negotiate to modify the agreement to suit your situation.

**Study the proposed agreement closely. Use the checklist on page 8 to ensure that you discuss all relevant aspects with the company. Negotiate all your concerns before signing.**

No one else will protect your asset, so make sure all special conditions are added **in writing** to the contract. Most verbal promises are not binding, and many contracts specifically state that the company does not acknowledge or honour such commitments. Always keep your copy of the signed lease agreement in a safe place. Only the signing company and you retain copies. If you are purchasing land with a well site, ask for a copy of the lease agreement.

### **Determining Compensation**

Your negotiations will include the issue of compensation paid to you for inconvenience and losses due to the well site. If you and the company cannot agree on compensation, the company can apply to the Surface Rights Board for a Right-of-Entry Order (see "If Lease Negotiations Fail: Right-of-Entry Process" below).

**The compensation payment considers the following aspects when using the Surface Rights Board as an arbitrator:**

- 1. Entry Fee:** The entry fee is equal to \$500 per acre of land granted to the company, to a maximum of \$5,000. For example, if the company needs a 4.25-acre site, the entry fee would be:  $4.25 \text{ acres} \times \$500 = \$2,125$ . The \$5,000 maximum applies when the area is 10 acres or larger. If the area is less than one acre, then the fee is that fraction of one acre  $\times \$500$ . The minimum entry fee is \$250, paid when the area is half an acre or less.
- 2. Land Value:** Usually the value of the land leased to the company is determined by the price expected if the land were sold on the open market by a willing seller to a willing buyer at the time when the lease was prepared or the Right-of-Entry Order issued. The value is also based on the highest approved use (agricultural, industrial, residential) for the land. The per acre value for the well site is determined by dividing the value of the titled unit by the number of acres required.
- 3. Initial Nuisance, Inconvenience and Noise:** This payment is for nuisance during the first year of the lease. For example, in the first year you will likely have to spend time dealing with the company's representatives and surveyors, preparing documentation, negotiating with the company and/or seeking advice from government agencies or lawyers. There may also be noise and inconvenience related to construction. The company should pay reasonable compensation to you for nuisance. Keep a record of all time spent, phone calls made and expenses incurred.
- 4. Loss of Use of the Land:** The company pays an annual compensation for your loss of the normal use of the well site area during the well site's life. The amount should approximate the value of the gross annual production reasonably expected from the area. To calculate the amount, you can use the greater of yield and price averages from the past five years, or today's street price. For example,

assuming canola production at 35 bushels per acre on a well site and access road occupying four acres, the loss would be  $4 \times 35 = 140$  bushels. At \$8.50 per bushel, the total annual loss would be \$1,190. Because you are asked to agree on losses for the next five years (see "Five-year Review" below), consideration should be given to future prices.

- 5. Adverse Effect:** This payment is related to your inconvenience, nuisance and extra costs on the rest of the quarter section where the well site is located. For instance, farming around the well site may require constantly turning corners, which can cause overlaps, extra strain on machinery, soil compaction, loss of seed and grain, and extra field and labour costs. Other factors related to adverse effect can be noise, dust, odour, additional traffic on the land, and proximity to a residence or farm site.
- 6. Other Relevant Factors:** If there are other considerations specific to your situation, include them when negotiating compensation.

The company must pay the first-year compensation – the total for the above six considerations – before doing any work on your land. Every year after the first year, the company pays compensation for the loss of use of the land and adverse effect (items 4 and 5).

If the landowner rents the land, it is usually up to the landowner and renter to work out how the compensation will be divided. A common practice is for the owner to receive the payments for the entry fee and land value, and for the other factors to be negotiated between the landowner and renter. If the Right-of-Entry process is necessary, then the Surface Rights Board decides how to divide the compensation between the landowner and renter.

On Crown land, the entry fee and land value are not payable. The other factors are negotiable.

Any and all of the above issues can be included in private negotiation along with loss of future gains.

## **Five-year Review**

Under the *Surface Rights Act*, the annual compensation must be reviewed every five years during the life of the well site. The company must give notice to you on or within 30 days after the fourth anniversary of the date the lease commenced or the Right-of-Entry Order was made. You do not have a right to an increase; only to a hearing. You need to have evidence to support an increase.

If you and the company cannot agree on a new compensation rate, either you or the company can apply to the Surface Rights Board in writing to have the board determine the rate. After holding a hearing to allow you and the company to give evidence, the board will set the new rate.

You and the company may also make changes to the lease at other times, if mutually agreed to.

## **Signing the Agreement**

A contract signed with the company representative is not binding until the company's authorized officers accept the contract and affix the company's corporate seal to it. Usually this takes a short time.

Always insist on a copy of the contract when you sign. If this is not possible, the company should sign first and bring the two signed copies (one for you and one for the company) to you for your signature.

Once both parties have signed the agreement, it is binding. You do **not** have a grace period to amend or cancel the agreement.

## **If Lease Negotiations Fail: Right-of-Entry Process**

If you and the company are unable to privately negotiate a lease agreement with appropriate compensation, then the company can apply to the Surface Rights Board for a Right-of-Entry Order to gain access and secure the lands. Once the Right-of-Entry Order is granted, a Surface Rights Board hearing will be held to set compensation. You may have a representative to assist you in presenting your concerns during the Right-of-Entry process.

For information or assistance with the Right-of-Entry process, call the Farmers' Advocate office at 310-FARM (3276) or the Surface Rights Board at (780) 427-2444 or visit its website at [www.surfacerights.gov.ab.ca](http://www.surfacerights.gov.ab.ca)

## **Operational Problems**

If you notice operational problems such as excessive noise, spills, contamination or odour during construction or operation of the well site, contact the company and the local ERCB Field Centre (see list on page 6).

If you notice damage outside of the leased area, contact Alberta Environment at (780) 427-2700 and the company.

## **Well Abandonment and Site Reclamation**

When a company ends its use of a well site, it must follow ERCB regulations for downhole abandonment of the well. Surface reclamation may start shortly after the downhole abandonment. However, legislation does not specify when a company has to start reclamation.

When the reclamation is completed, the company can apply to Alberta Environment for a reclamation certificate. The landowner receives a copy of this application. There is a landowner complaint process, so contact the company and Alberta Environment if you have concerns.

If the application meets Alberta Environment's criteria, then a reclamation certificate is issued. The company can then terminate the lease or Right-of-Entry Order.

You have a one-year window to appeal the reclamation certificate. If a problem arises at any time after a certificate is issued, Alberta Environment will ensure that either the company or the government will address the situation. If you have questions or problems related to site reclamation, Alberta Environment's information line at (780) 427-2700 can provide a contact for your regional office.

# **Other Types of Surface Rights Agreements**

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You may also be approached about having a pipeline, power line or telephone line crossing your land. Under the *Surface Rights Act*, pipeline and utility companies have right-of-entry to construct pipelines, power lines and telephone lines.

For pipeline information refer to the publication *Pipelines in Alberta – What Farmers Need to Know*, available from the Farmers' Advocate office.

Major transmission lines are covered by long-term agreements called easements. They qualify for an annual compensation payment, plus an entry fee and the market value of the land. The ERCB defines a major transmission line as a 69-kilovolt transmission line or larger.

For more information on these other types of surface rights agreements, contact the Farmers' Advocate office at 310-FARM (3276).

## **For More Information**

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*To call toll-free to any of these phone numbers, dial 310-0000 first.*

### **The Farmers' Advocate Office**

Phone: 310-FARM (3276)

Website: [www.farmersadvocate.gov.ab.ca](http://www.farmersadvocate.gov.ab.ca)

### **Energy Resources Conservation Board**

#### **General Enquiries**

Phone: (403) 297-8311, toll-free dial 310-0000 first.

Website: [www.ercb.ca](http://www.ercb.ca)

E-mail: [inquiries@ercb.ca](mailto:inquiries@ercb.ca)

### **Field Centres**

Bonnyville	(780) 826-5352
Drayton Valley	(780) 542-5182
Grande Prairie	(780) 538-5138
High Level	(780) 926-5399
St. Albert	(780) 460-3800
Medicine Hat	(403) 527-3385
Midnapore	(403) 297-8303
Red Deer	(403) 340-5454
Wainwright	(780) 842-7570

### **Alberta Environment**

#### **Regional Office Information**

Phone: (780) 427-2700

Website: [www3.gov.ab.ca/env/](http://www3.gov.ab.ca/env/)

#### **Emergency Hotline for Spills, Contamination, Etc.**

Phone: 1-800-222-6514

### **Surface Rights Board**

Phone: (780) 427-2444

Website: [www.surfacerights.gov.ab.ca](http://www.surfacerights.gov.ab.ca)

## **Surface Lease Terms**

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**Access** – The right to enter private land.

**Certificate of Title** – A document based on a title search stating that the title is vested in a designated person and showing outstanding liens, charges or other encumbrances.

**Covenants** – An agreement written into deeds, grants or conveyances promising performance or non-performance of certain acts, or stipulating certain uses or non-uses of the property.

**Easement** – A non-possessing interest held by one person in the land of another whereby the first person is accorded partial use of the land for a specific purpose. Examples of easements are rights-of-way for power lines or pipelines.

**Encumbrance** – Anything that affects or limits the title to property, such as mortgages, easements, liens or restrictions of any kind.

**Enurement** – A provision in an agreement that makes the agreement binding on the lessor's and lessee's heirs, executors, administrators and successors.

**ERCB** – Energy Resources Conservation Board.

**Indemnification** – A provision in an agreement that protects one party in the agreement from legal consequences that result from an act of the other party in the agreement.

**Indenture of Lease** – The part of the lease that identifies the owner and the company and their respective addresses, and the legal description of the land as registered in the Land Titles Office.

**Lessee** – One who acquires the right to use the property of another by a lease or rental agreement.

**Lessor** – A landowner who leases or rents the right of use of property to another.

**Market Value** – The highest price for which property can be sold on the open market by a willing seller to a willing purchaser.

**Occupant** – A person, other than the registered owner, who is in actual possession of the land or entitled to be in possession of the land.

**Owner** – The person in whose name a Certificate of Title has been issued.

**Right-of-Entry Order** – A Surface Rights Board Order granting a company the use of a certain area of the land surface for operations such as drilling for minerals or constructing roadways.

**Surface Lease** – Any agreement entered into by an owner or occupant with a company under which the surface of the land may be used and which provides for the payment of compensation.

## Well Site Negotiation Checklist

	Yes	No	N/A	Notes
<b>Information packages received</b>				
• Energy Resources Conservation Board				
• Alberta Environment				
• Farmers' Advocate				
<b>Company identity</b>				
• head office – contact name and phone number				
• field staff – contact name and phone number				
<b>Project and lease explained</b>				
<b>48-hour waiting period explained (Section 17, <i>Land Agents Licensing Act</i>)</b>				
<b>Timing of activities (if known)</b>				
• start				
• construction period				
<b>Access road traffic</b>				
<b>Livestock concerns</b>				
<b>Landowner/company</b>				
<b>Fencing</b>				
<b>Weed control</b>				
<b>Topsoil handling</b>				
<b>Site reclamation</b>				
<b>Drilling waste disposal process</b>				
<b>Impact of activity on adjacent land (setbacks, etc.)</b>				
<b>Compensation</b>				
• entry fee				
• land value				
inconvenience during construction				
• loss of use of land				
• adverse effect on rest of quarter section				
• other				
• compensation explained (Surface Rights Act)				



